



**Office of the Attorney General  
State of Texas**

**DAN MORALES**  
ATTORNEY GENERAL

March 24, 1995

Honorable Allen D. Place, Jr.  
Chair  
Criminal Jurisprudence Committee  
Texas House of Representatives  
P.O. Box 2910  
Austin, Texas 78768-2910

Letter Opinion No. 95-023

Re: Whether section 12.36 of the Education Code prohibits the president of a school board from accepting employment as an attorney with a law firm in which other attorneys represent a textbook publishing company (ID# 32338)

Dear Representative Place:

You ask whether section 12.36 of the Education Code would require the president of the board of an independent school district to forfeit his or her seat on the board if he or she joins a large law firm as what you call a "non-equity partner." You indicate that at least one other attorney in the law firm represents a textbook publishing company selling textbooks in Texas, but that the school board president would not represent or participate in the representation of the textbook company. Furthermore, the school board president would recuse him- or herself from participating in any of the school board's decisions relating to textbooks.

By the terminology "non-equity partner," we understand you to mean an employee who receives a fixed annual salary that is independent of increases or decreases in the law firm's billings. We further understand you to mean that the employee will not participate in the management of the firm. We base our opinion upon these assumptions. We also assume that your description of the facts is accurate. Given these assumptions, we conclude that section 12.36 of the Education Code does not as a matter of law prohibit the president of the board of an independent school district from accepting employment with a law firm in which other attorneys represent a textbook publishing company selling textbooks in Texas.

Education Code section 12.36 provides as follows:

During the term of his employment, a trustee or teacher in any public school or institution of higher learning in Texas, county or city superintendent, university president, or college president shall not act as agent or attorney for any textbook publishing company selling

textbooks in Texas. Acceptance of the agency or attorneyship shall by operation of law forfeit his position with the public schools.

The legislature enacted the first statutory ancestor of section 12.36, article 2904 of the Revised Civil Statutes, in 1905. See Act effective August 30, 1905, 29th Leg., R.S., ch. 124, § 175, 1905 Tex. Gen. Laws 263, 309-10. Since its original enactment, and for our purposes here, section 12.36 and its statutory predecessors have remained substantially the same: they have prohibited a member of the board of trustees of a public school from, during the time of the member's term of office,<sup>1</sup> acting as an "agent or attorney" for any textbook publishing company selling textbooks in the state.<sup>2</sup>

This office has issued two opinions relevant to the situation you present. First, in Attorney General Opinion O-5231 this office considered the plight of a newly elected trustee of the Austin Independent School District, Mr. Jackson, who was one of the

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<sup>1</sup>The 1905 and 1935 enactments provided in pertinent part as follows:

No member of the Board of Trustees of any public school, nor teacher in any of the public schools in this State, . . . shall, *during the time of his office as Trustee . . .*, or during the time of his employment as teacher, act as agent or attorney for any textbook publishing company selling textbooks in this State. . . .

See Act of April 25, 1935, 44th Leg., R.S., ch. 109, § 1, 1935 Tex. Gen. Laws 295, 295; Act effective August 30, 1905, 29th Leg., R.S., ch. 124, § 175, 1905 Tex. Gen. Laws 263, 309-10 (emphasis added). In 1969, when the legislature adopted the Education Code, it removed the language italicized above, referring only to the term of "employment." Thus, section 12.36 of the Education Code refers only to "the term of his employment."

<sup>2</sup>In 1935 the legislature enacted article 2910, which replaced article 2904. See Act of April 25, 1935, 44th Leg., R.S., ch. 109, § 1, 1935 Tex. Gen. Laws 295, 295. Article 2910 provided substantially as article 2904 had, except that the legislature deleted a sentence making ineligible for service as school trustee, county or city superintendent of schools, or as teacher any individual acting in the capacity of agent or attorney for textbook publishers or dealers. In describing the imperative public necessity that abrogated the constitutional duty to read the bill on three consecutive days, the legislature stated that the original article

worked a hardship on many eminent textbook authors in the State of Texas who are now holding positions in the public schools of this State, by preventing the public schools of this State from using the textbooks of such authors while these authors are holding such positions in the schools of our State, and the fact that such law now compels the Textbook Commissioners of this State to adopt texts from other States, whereas more appropriate textbooks written by Texas authors should be adopted.

Act of April 25, 1935, 44th Leg., R.S., ch. 109, § 2, 1935 Tex. Gen. Laws 295, 295. Although the substance of article 2910 has been renumbered twice since 1935, the content has remained the same.

principal stockholders in the Steck Company, a corporation holding contracts for the publication of public school textbooks. Attorney General Opinion O-5231 (1943) at 1. Mr. Jackson also was general manager and vice president of the Steck Company. *Id.*

Mr. Jackson was not an attorney for the Steck Company. *Id.* at 2. As general manager, however, the opinion concluded that Mr. Jackson was an agent of the company. *Id.* "[T]he term 'general manager' . . . signifies one who has the authority to perform all things reasonably proper in the conduct of the concern's business . . ." *Id.* at 2-3 (citations omitted).<sup>3</sup>

In Attorney General Opinion M-712 this office considered whether section 12.36's immediate statutory predecessor applied in a situation in which a trustee of the Eanes Independent School District, Mr. Tenney, was employed as the Southwest Regional Editor for Prentice-Hall, Inc. As regional editor, Mr. Tenney contacted college professors about buying the professors' manuscripts for possible publication by Prentice-Hall, and he was responsible for developing and editing the manuscripts into textbooks. Attorney General Opinion M-712 (1970) at 2-3. Mr. Tenney stated, among other things, that he supervised no employees, that he had no authority to execute a contract on behalf of Prentice-Hall, and that he lacked authority to institute legal proceedings on behalf of Prentice-Hall. *Id.*

Assuming the truth of Mr. Tenney's allegations, the opinion concluded that section 12.36's statutory predecessor applied only to agents and attorneys; it did not apply to "a mere employee of a textbook publishing company." *Id.* at 4. The analysis began by stating the accepted proposition "that any statutory provision 'which restricts the right to hold public office should be strictly construed against ineligibility.'" *Id.* (quoting *Willis v. Potts*, 377 S.W.2d 622, 623 (Tex. 1964)). Next, the opinion compared the 1935 version of section 12.36 to a 1927 statute, V.T.C.S. article 2840, which obligated every member of the State Textbook Committee to file an affidavit before entering upon his or her duties that he or she "is not and has not been directly or indirectly interested in or connected with or employed by any publishing house, person, firm or corporation submitting any books for adoption." *Id.* (quoting V.T.C.S. art. 2840). The opinion noted that section 12.36's statutory predecessor referred only to agents and attorneys of a textbook publishing company that sells textbooks in Texas. *Id.* at 5. On the other hand, article 2840 applied to an individual with any direct or indirect interest in, connection with, or employment in a publishing house. *Id.*

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<sup>3</sup>Interestingly, the opinion did not conclude that Mr. Jackson forfeited the trusteeship. *Id.* at 3. Instead, the opinion said that, upon qualifying for and assuming the office, Mr. Jackson became a de facto trustee, and as long as he continued in office, he would continue to be a de facto trustee. *Id.*

Consequently, the opinion concluded, the terms "agent and employee" in section 12.36's statutory predecessor "do not include a mere employee." *Id.* at 7. Based upon the facts presented, this office concluded Mr. Tenney was a "mere" employee, partly because he lacked authority to "establish contractual relations for his employer with third persons." *Id.* at 7, 8.

These two opinions, particularly Attorney General Opinion M-712, instruct us to construe section 12.36 strictly against ineligibility. See Attorney General Opinion M-712 (1970) at 4 (quoting *Willis v. Potts*, 377 S.W.2d 622, 623 (Tex. 1964)). Additionally, because section 12.36 is penal in nature, we must resolve any reasonable doubt against its enforcement. *Id.* at 5 (citing 25 TEX. JUR. 2D *Forfeitures* § 10, and cases cited therein).

Moreover, we learn that, at least with respect to a nonattorney member of a school board who is in a relationship with a textbook publishing company that sells textbooks in Texas, section 12.36 applies only to those school board members who are agents of the company. Agency is a fiduciary relation that results when one person manifests consent to a second person that the first person will act on behalf of the second person and subject to the control of the second person, and the second person consents to the arrangement. 1 AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF AGENCY SECOND § 1(1), at 7 (1958).

The term "agent" includes within its a scope person who acts in business transactions on behalf of another, such as an attorney-at-law who is employed either for a single transaction or for a series of transactions, even though the attorney acts as an independent contractor.<sup>4</sup> *Id.* § 1, cmt. e, at 11. "In fact, most of the persons known as agents, that is, . . . , attorneys, . . . are independent contractors . . . , since they are contractors but, although employed to perform services, are not subject to the control or right to control of the principal<sup>5</sup> with respect to their physical conduct in the performance of the services." *Id.* § 14N, at 80. Not all independent contractors are agents, of course; to be an agent, an independent contractor must be a fiduciary, owing to the principal loyalty and obedience. *Id.*

The pairing of "agent" with "attorney" leads us to believe the legislature used the word "attorney" to refer only to those attorneys who are in an agency, or fiduciary,

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<sup>4</sup>For purposes of the Restatement, the term "independent contractor" includes "all persons who contract to do something for another but who are not servants in doing the work undertaken." 1 AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF AGENCY SECOND § 2, cmt. b, at 13 (1958).

<sup>5</sup>A "principal" is the person for whom the agent acts. *Id.* § 1, at 7.

relationship with a textbook publishing company that sells textbooks in Texas. We therefore construe the term "attorney" for purposes of section 12.36 of the Education Code narrowly to include only the attorney or attorneys actually authorized to act on behalf of the textbook publishing company as agents. Of course, a textbook publishing company may designate a particular attorney or attorneys to act as its agent or it may designate an entire law firm as its agent. An attorney who works for the same law firm as the attorney or attorneys representing the textbook publishing company is outside the scope of the term "attorney" for purposes of section 12.36 only if the textbook publishing company has designated another particular attorney as its agent and not the firm as a whole.

Accordingly, we conclude that section 12.36 does not, as a matter of law, prohibit the president of the board of an independent school district from becoming an employee of a law firm in which one or more other attorneys represent a textbook publishing company selling textbooks in Texas. In reaching this conclusion, we assume the textbook publishing company has established an agency relationship with a particular attorney or attorneys in the law firm, other than the school board president, and not the law firm as a whole. The facts, as you have described them, indicate that the president of the school board will not be an agent of the textbook publishing company in his or her employment at the law firm.

You do not ask about other statutes or rules that might affect the proposed arrangement; thus, we do not consider other statutes or rules that might apply. We caution, however, that both the school board president and the law firm in the situation you describe should consider carefully section 171.004(a) of the Local Government Code and rule 1.08(i) of the Texas Disciplinary Rules of Professional Conduct, as well as any other applicable provisions of law.<sup>6</sup>

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<sup>6</sup>Section 23.201 of the Education Code prohibits the board of trustees of a school board from contracting with a trustee, the spouse of a trustee, or a business entity in which the trustee or trustee's spouse has a "significant interest." State district court judge Margaret Cooper permanently has enjoined the enforcement of section 23.201. See *Cathey v. State*, No. 93-10120 (98th Dist. Ct., Travis County, Tex., Feb. 22, 1994). In Attorney General Opinion DM-256 (1993) this office discussed Education Code section 23.201 as though it is cumulative of the conflict of interest provisions in the Local Government Code, although we did not expressly consider the issue.

**S U M M A R Y**

Section 12.36 of the Education Code prohibits only an attorney who is in an agency, or fiduciary, relationship with a textbook publishing company selling textbooks in Texas from holding a position as a trustee of an independent school district. Section 12.36 does not prohibit an attorney who works for the same law firm as the attorney or attorneys representing the textbook publishing company from holding office on the board of trustees of an independent school district if the textbook publishing company has established an agency relationship with other specific attorneys in the firm, as opposed to the firm as a whole.

Thus, section 12.36 does not prohibit the president of the board of an independent school district from becoming an employee of a law firm in which one or more other attorneys represent a textbook publishing company selling textbooks in Texas where the textbook publishing company has designated a particular attorney or attorneys in the firm, other than the school board president, as its agent.

Yours very truly,

A handwritten signature in black ink, reading "Kimberly K. Oltrogge", with a long horizontal flourish extending to the right.

Kimberly K. Oltrogge  
Assistant Attorney General  
Opinion Committee